Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service	)	ET Docket No. 95-18

COMMENTS OF NEW DBSD SATELLITE SERVICES G.P.

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COMMENTS OF NEW DBSD SATELLITE SERVICES G.P.

I. INTRODUCTION AND SUMMARY

New DBSD Satellite Services G.P. ("DBSD") submits these comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] DBSD opposes the Commission's proposal to modify cost-sharing requirements for relocation of broadcast auxiliary service ("BAS") licensees.

First, this rulemaking should be stayed under applicable bankruptcy law because DBSD has filed for Chapter 11 protection. The automatic stay under Section 362 of the Bankruptcy

[1] *See Improving Public Safety Communications in the 800 MHz Band,* Report and Order and Order and Further Notice of Proposed Rulemaking, FCC 09-49 (June 12, 2009) ("*Order and FNPRM*" or "*FNPRM*").

Code precludes the Commission from adjudicating the current dispute between Sprint and DBSD.[2] The Commission cannot sidestep the automatic stay by proceeding in a nominal "rulemaking" mode, when the effect is the same as if it had openly proceeded by way of adjudication.

Second, the Commission's proposed rulemaking cannot proceed because it would be impermissibly retroactive. Instead of resolving the current issues on the basis of the *existing* regulations, the Commission proposes to adopt *new* requirements years after the fact. Agencies are not permitted to issue new regulations that alter the rights of parties in the past. Since the existing regulations contain applicable definitions and a deadline that has now passed, changing those requirements would violate the bedrock ban on retroactivity.

Third, even if the proposed regulations were not both stayed and unlawful, they would still be unjustified. The current regime is the result of a careful balancing of numerous interests under unusual circumstances in which Sprint was awarded billions of dollars of additional spectrum in return in large part for its clearing commitments. Since that time, the only core change in circumstances is that Sprint has missed by years the clearing deadline that it voluntarily assumed and that the Commission had assigned to it. Yet the current proposal seeks to absolve Sprint of its responsibility for that failure for reasons that are unavailing, arbitrary, and capricious.

Fourth, if the Commission nonetheless issues new regulations despite all of these flaws, any modification to the rules also must account for all of the additional burdens that current circumstances have placed on MSS entrants. Several changes are required, and the Commission

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[2] *See* 11 U.S.C. § 362.

certainly should not compound the impermissibility and unfairness of the proposed regulations by adopting changes that would *increase* the amounts eligible for reimbursement.

Finally, MSS entrants should be allowed to operate on a secondary basis in uncleared markets without unnecessary and costly coordination. DBSD showed in its earlier submission that interference would rarely if ever occur even in uncleared markets. The Commission's conclusion to the contrary, DBSD respectfully submits, is based on a misunderstanding of that information.

II. THE PROCEEDING SHOULD BE STAYED UNDER THE BANKRUPTCY CODE BECAUSE DBSD HAS FILED FOR CHAPTER 11 PROTECTION

This "rulemaking" proceeding must be stayed under Section 362(a) of the Bankruptcy Code, which provides in relevant part as follows:

> Except as provided in subsection (b) of this section, a petition filed [to commence a Chapter 11 bankruptcy proceeding] operates as a stay, applicable to *all entities*, of—
>
> (1) the commencement or continuation, including the issuance or employment or process, of judicial, *administrative, or other action or proceeding* against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> * * *
>
> (3) *any act* to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> * * *
>
> (6) *any act* to collect, *assess, or recover* a claim against the debtor that arose before the commencement of the case under this title . . . .[3]

The Commission's rulemaking proceeding here is controlled by the mandatory and automatic statutory stay that Congress established in Section 362(a). The rulemaking directly

[3] 11 U.S.C. § 362(a) (emphasis added).

involves Sprint's band-clearing reimbursement claims against DBSD—both any potential claims of that nature and the actual and specific claims to reimbursement that Sprint brought in the U.S. District Court for the Eastern District of Virginia and that were later referred to the Commission under the doctrine of primary jurisdiction. Sprint's claim against DBSD had already arisen at the time it brought suit, and hence predated DBSD's bankruptcy petition, as Sprint itself noted in its federal court suit and in its request for a declaratory order from the Commission following in the wake of the primary jurisdiction referral. Moreover, this proceeding directly involves Sprint's attempt to obtain possession of or recover property from DBSD's estate, and is designed in part to address (and expand) the scope of the reimbursement obligation Sprint claims it is owed by DBSD. Accordingly, this proceeding is subject to multiple subparagraphs of the automatic stay provision in the Bankruptcy Code—in particular Section 362(a)(1),(3), and (6).

Especially in light of the primary jurisdiction doctrine referral to the Commission, a Commission decision in the rulemaking as to when DBSD entered the band also would constitute an adjudication of that issue in a monetary reimbursement dispute, and thus would be barred pursuant to the automatic stay.[4] In fact, the Commission concedes that under present circumstances its *only* role related to band entry is to establish the nature of the cost-sharing obligation concerning band-clearing.[5]

The Bankruptcy Code's automatic stay provision operates to enjoin various actual or potential proceedings immediately upon the filing of a bankruptcy petition (and without the need

[4] *See Order and FNPRM*, ¶ 74 (noting Sprint's request for a declaratory ruling that MSS operators are liable for a *pro rata* share of Sprint's reimbursement obligations).

[5] *Id.* ¶ 90 ("Because the Commission has already determined that MSS and AWS-2 entry in the 2 GHz band requires that all BAS operations in the band be relocated to avoid interference between the new and incumbent services, *we only need to determine here when a new entrant 'enters the band' for purposes of the attachment of the cost sharing obligation*.") (emphasis added).

for any action or additional order by the Bankruptcy Court). The purpose of the automatic stay is to "prevent interference with, or diminution of, the debtor's property" while the bankruptcy process unfolds, so as to "prevent a creditor from defeating the jurisdiction of the bankruptcy court over the debtor's property by instituting another action in a different forum."[6] Courts interpret the protections of section 362(a) broadly to effectuate these goals.[7]

The Commission's proposed regulations implicate the core purposes of Section 362(a) because they attempt to "clearly delineate[] cost-sharing requirements" among Sprint, DBSD, and TerreStar concerning more than $200 million in aggregate BAS relocation reimbursement claims asserted by Sprint.[8] Hence, this rulemaking is directly targeted at the reimbursement obligation Sprint claims against DBSD. Moreover, Sprint's claim against DBSD, if allowed, would constitute a significant portion of DBSD's total estate. Resolution of DBSD's reimbursement duties by the Commission would severely interfere with the uniform and controlled disposition of DBSD's property under the exclusive *in rem* jurisdiction of the Bankruptcy Court. Section 362 prevents Sprint from using the Commission's proceedings to attain such an advantaged position vis-à-vis DBSD's other potential creditors. And the Commission therefore cannot undermine this prohibition by instituting any form of proceeding to assist Sprint in its efforts to recover on Sprint's claims, just as a federal court other than the Bankruptcy Court (such as the Eastern District of Virginia) would lack the power to entertain proceedings to further Sprint's claim-recovery efforts.

The automatic stay is applicable to this rulemaking proceeding. Section 362(a), by its terms, is not limited to adjudicatory proceedings. For instance, Section 362(a)(6) includes "*any*

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[6] *See Teledyne Indus. v. Eon Corp.*, 373 F. Supp. 191, 203 (S.D.N.Y. 1974).

[7] *See In re Enron Corp.*, 314 B.R. 524, 533 (Bankr. S.D.N.Y. 2004).

[8] *See Order and FNPRM* ¶ 81.

act" that would have the effect of "*assess*[*ing*]" a "claim" against the debtor. This Commission proceeding plainly would have such an effect.[9]

In any event, agencies may not use their rulemaking powers to circumvent limitations on their adjudicatory powers. Notably, the United States Bankruptcy Court for the Central District of California permanently enjoined generally applicable regulations that the Interstate Commerce Commission ("ICC") adopted to circumvent a statutory provision precluding the ICC from adjudicating rate-undercharge claims brought by trucking companies against shippers pursuant to the filed-rate doctrine.[10] The court found that "[a]lthough the ICC Bankruptcy Regulations purport to affect carriers other than those in bankruptcy, it appears from the Ex Parte Order that the Regulations were promulgated specifically for application in this case."[11] The court consequently held that the ICC regulations violated the Bankruptcy Code's automatic stay provision.[12]

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[9] For similar reasons, the Commission could not successfully establish that because this rulemaking proceeding affects TerreStar as the other remaining MSS entrant, it is therefore outside the purview of the automatic stay. Proceedings of general applicability are not excluded from Section 362(a). Instead, Section 362(a)(1) refers to a unitary "proceeding," singular, of any kind, and subparagraphs (a)(3) and (a)(6) of Section 362 stay "any acts" that would have the effect of allowing estate property to be recovered against or claimed. *See* 11 U.S.C. § 362(a)(6).

[10] *See In re Transcon Lines*, 147 B.R. 770, 774-77 (Bankr. C.D. Cal. 1992).

[11] *Id.* at 774.

[12] *Id.* The ICC took an appeal of the court's decision to the Bankruptcy Appellate Panel of the Ninth Circuit, but later functionally conceded the invalidity of its rules by moving to withdraw its bankruptcy appeal. When it dropped its appeal, the ICC asked the Bankruptcy Appellate Panel of the Ninth Circuit to vacate the Bankruptcy Court's permanent injunction and its supporting decision, but the Bankruptcy Appellate Panel declined to do so. *See In re Transcon Lines*, 178 B.R. at 231 (Bankr. C.D. Cal. 1995). Moreover, the Bankruptcy Court also awarded to the bankruptcy trustee nearly $43,000 in attorney's fees against the Commission under the Equal Access to Justice Act for advancing the unmeritorious argument that the automatic stay provision did not apply to the ICC's rules. *Id.* at 236. The Bankruptcy Court specifically faulted the "Commission [for] fail[ing] to give the Trustee's comments [concerning applicability of the automatic stay] serious consideration." *Id.*

In *White*, a case involving the same ICC regulations at issue in *Transcon Lines*, the Court of Appeals for the Third Circuit also enjoined the regulations.[13] In that case, the ICC argued its new rules did not violate a congressional directive barring ICC adjudication of certain claims because the new process was not nominally "adjudication."[14] The court rejected that argument, explaining that "[t]hroughout, the [ICC] has merely labeled the Review Process as 'pre-screening,' a gloss that cannot disguise, as something other than adjudication, the process of reviewing claims for a determination on the merits of their facial validity."[15]

In the *FNPRM*, the Commission repeatedly states or implies how its proposed regulations specifically would apply to Sprint's claims against DBSD.[16] Those statements make clear the Commission's intent to alter the legal landscape and to functionally adjudicate Sprint's claim against DBSD.[17] As a result, the *FNPRM* is subject to the automatic stay regardless of how it is denominated.

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[13] *See White v. United States*, 989 F.2d 643 (3d Cir. 1993).

[14] *Id.* at 648.

[15] *Id.*; s*ee also id.* at 649 ("The [ICC] cannot disguise the adjudicative nature of the Review Process by arguing that the [ICC] will determine the merits only of 'non-colorable' claims; partial adjudication is nonetheless adjudication. The [ICC] also misses the mark when it asserts that it will determine many claims before they ever reach a court; the timing of the [ICC's] review and disapproval of some claims does not mask the adjudicative nature of the Review Process. Similarly, the [ICC] misses the mark when it asserts that the Rules allow for the concurrent filing of a court action to preserve meritorious claims; permitting meritorious claims to go forward elsewhere does not change the fact that the [ICC] would be adjudicating, in the first instance, which claims are not meritorious.").

[16] *See, e.g.*, *Order and FNPRM*, ¶ 91 nn. 199 & 201.

[17] In *White*, the ICC's disguised adjudicatory process was invalidated even though its rulemaking purported only to lead to declaration of the rights of the plaintiff on a claim and did not require the presence of the defendant. *See White,* 989 F.2d at 649. Hence, the Commission cannot shield its rulemaking here from the automatic stay by claiming that the present rulemaking merely clarifies, as a general matter, the rights of Sprint to recover for its band-clearing activities.

Finally, the police power exception to the automatic stay, contained in Section 362(b)(4) of the Bankruptcy Code, does not apply here. Section 362(b)(4) is a "very limited exception to the automatic stay."[18] It exempts from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit…to enforce such governmental unit's…police and regulatory power, *including the enforcement of a judgment other than a money judgment*, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's …police or regulatory power."[19] As the legislative history of this provision makes clear, "[t]his section is …not [intended] to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor."[20] To fall inside the exception, therefore, the governmental unit cannot be acting "in furtherance of either its own or certain private parties' interest in obtaining a pecuniary advantage over other creditors."[21]

Since the true-up process permits Sprint to recover for its reimbursement costs (by way of an offset against its obligation to pay the U.S. Treasury for the spectrum Sprint obtained), even if Sprint cannot recover such costs from MSS entrants, Sprint's pecuniary interests are plainly implicated, and therefore the Commission may not invoke the Section 362(b)(4) police power exception.[22] Rather than evidencing a primary concern for "public policy," the proposed

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[18] *See In Re Fugazy Exp., Inc*., 114 B.R. 865, 873 (Bankr. S.D.N.Y. 1990).

[19] 11 U.S.C. § 362(b)(4) (emphasis added).

[20] 124 CONG. REC. 32,395 (1978) (remarks of Rep. Edwards).

[21] *Chao v. Hospital Staffing Servs., Inc.*, 270 F.3d 374, 389 (6th Cir. 2001); *see also In re Enron Corp.*, 314 B.R. 524, 535 (Bankr. S.D.N.Y. 2004) ("if the purpose of the law relates 'to the protection of the government's pecuniary interest in the debtor's property,' or to adjudicate private rights, the exception is inapplicable and the automatic stay applies.")

[22] Sprint has acknowledged that it is allowed to recover from the Commission band relocation costs it cannot recover from MSS entrants. *See* Status Report Regarding Federal Communications Commission Decision, at 2 (June 17, 2009), *filed in Sprint Nextel Corp. v. New ICO Satellite Servs. G.P.*, No. 1:08-cv-651 (E.D. Va.) ("MSS or AWS-2 entrants must reimburse

regulations thus only "incidentally serve[] public interests but more substantially adjudicate[] private rights" and should accordingly fall "outside of the police power exception," particularly since the rules "would result in a pecuniary advantage to [Sprint] vis-à-vis other creditors of the estate."[23] In other words, a monetary judgment as between Sprint and DBSD is clearly involved, and thus the police powers of the Commission cannot overcome the automatic stay, given the limits Congress established on the narrow Section 362(b)(4) exception.[24]

III. THE PROPOSED MODIFICATION OF THE COST-SHARING REQUIREMENTS IS IMPERMISSIBLY RETROACTIVE

The Commission's proposed modification of the BAS cost-sharing requirements would retroactively impose a new reimbursement obligation upon MSS operators, in violation of basic administrative law restrictions. *Bowen v. Georgetown University Hospital* precludes agencies from issuing rules having retroactive effect unless they have been explicitly granted that authority by Congress[25]—and Congress has not delegated such a power to the Commission.[26] Section 551(4) of the Administrative Procedure Act ("APA") requires that agency "rules" adopted under rulemaking procedures be given "future effect" only.[27] A regulation has retroactive effect if it "attaches new legal consequences to events completed before its

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Sprint when they 'enter the band' prior to the proposed sunset date of December, 2013, ***or*** Sprint may choose to take credit against the anti-windfall payment.") (emphasis added).

[23] *Chao*, 270 F.3d at 390.

[24] *See Fugazy,* 114 B.R. at 873 (Commission cancellation of license violated the automatic stay and did not fall under the police power exception because it involved a pecuniary interest in the property of the debtor).

[25] 488 U.S. 204, 207 (1988).

[26] *See Jahn v. 1-800-FLOWERS.com, Inc.*, 284 F.3d 807, 810 (7th Cir. 2002) ("No statute authorizes the [Commission] to adopt regulations with retroactive effect").

[27] 5 U.S.C. § 551(4); *see also Georgetown Univ. Hosp. v. Bowen,* 821 F.2d 750, 757 (D.C. Cir. 1987) ("the APA requires that legislative rules … be given future effect only"). The Commission enjoys no exception from this general rule.

enactment,"[28] such as by "impair[ing] rights a party possessed when he acted, increas[ing] the party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed."[29] As the Supreme Court has explained, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[30] Thus, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."[31]

The legal and financial consequences of previously completed BAS relocation events therefore must be determined based on the existing regulations. As the Commission acknowledged, under its existing regulations, MSS operators are obligated to reimburse Sprint for a *pro rata* share of the BAS relocation costs *only if* they "entered the 2 GHz band before the then-contemplated 36-month 800 MHz rebanding period, a date later established to be June 26, 2008."[32] These regulations have been in place for years—and well past the June 26, 2008 termination date. The Commission also acknowledged that it could issue a declaratory ruling

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[28] *Landgraf v. USI Film Prods,* 511 U.S. 244, 269-70 (1994).

[29] *Id.* at 280; *see also Bellsouth Telecommunications., Inc. v. Southeast Tel., Inc.*, 462 F.3d 650, 658 (6th Cir. 2006).

[30] *Landgraf*, 511 U.S. at 265.

[31] *Id.* (quoting *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

[32] *Order and FNPRM* ¶ 78; *see also Improving Public Safety Communications in the 800 MHz Band,* Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 261 (2004) ("*800 MHz Order*"); *Improving Public Safety Communications in the 800 MHz Band,* Third Memorandum Opinion and Order, 22 FCC Rcd 17209, ¶ 28 (2007). The Commission further noted that it "has not extended the original 36-month rebanding period; rather, it has found that the 36-month rebanding period has 'expired' and is granting waivers for licensees who make a 'good cause' showing." *Order and FNPRM* ¶ 78 n.177.

adjudicating the rights of the parties based on the existing regulations.[33] However, the Commission has "decline[d] to do so at this time" and instead is "propos[ing] new requirements."

The Commission's proposed "new requirements," however, would retroactively attach new legal and financial consequences to events already completed by impairing vested MSS rights and imposing new duties with respect to events already completed.[34] The proposed new requirements are retroactive in numerous respects, including but not limited to nullifying vested MSS rights by extending the reimbursement termination date of June 26, 2008 long after that date has passed.[35]

These proposed new regulations do not merely "call[] for application of the cost reimbursement principles in effect at the time the costs were incurred."[36] Rather, they require the application of new reimbursement principles to events completed on or prior to the MSS reimbursement termination date of June 26, 2008.[37] As the courts have noted, "[c]hanging today's financial consequences of an earlier transaction is the paradigm of retroactivity …. a wealth transfer that depends on events preceding the rule's adoption has a retroactive effect."[38]

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[33] As discussed in Section II above, however, the Commission cannot do so now because its ability to issue a declaratory ruling is automatically stayed under the Bankruptcy Code.

[34] *See Landgraf*, 511 U.S. at 269 (a regulation that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation … in respect to transactions or considerations already past, must be deemed retrospective …") (quoting *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814)).

[35] *See Order and FNPRM* ¶ 84.

[36] *See Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) (holding that regulation was not impermissibly retroactive).

[37] *Order and FNPRM* ¶¶ 72-74; *see also Bowen*, 488 U.S. at 207 (regulation at issue impermissibly invoked a new substantive standard as a basis for recouping sums previously paid to hospitals).

[38] *Jahn,* 284 F.3d at 811.

Indeed, changing reimbursement rules mid-stream has been deemed by the Supreme Court to constitute the very core of the constitutionally inspired restrictions on retroactivity.[39]

The June 26, 2008, date operated under existing Commission regulations to terminate any MSS reimbursement obligation. The Commission cannot now reverse the legal effect of that date merely by extending it long after the date has passed. In setting a firm termination date for the MSS reimbursement obligation, the Commission intentionally deviated from the cost-sharing principles that generally apply to fixed microwave relocations.[40] The Commission explained that "limiting the amount of [Sprint] Nextel's reimbursement in this manner strikes an appropriate balance that is not unreasonably burdensome on [Sprint] Nextel or MSS licensees."[41] Thus, the existing MSS reimbursement requirements expressly incorporate the principle that later entrants (*e.g.,* MSS operators) are not required to reimburse the first entrant (*i.e.,* Sprint) after a 36-month period.

On further consideration of the issue, the Commission reaffirmed its decision "to end the reimbursement obligations of other entrants to [Sprint] Nextel" at the end of the 36-month 800 MHz rebanding period "for administrative efficiency in the accounting process and because of

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[39] "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance. [Proceeding to collect cases spanning more than a century.] *Bowen* . . . was in step with this long line of cases. *Bowen* itself was a paradigmatic case of retroactivity [in the cost-reimbursement context] . . . ." *Landgraf*, 511 U.S. at 271-72 (1994) (citation omitted).

[40] The Commission stated that it "decided to generally follow the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit, *except as discussed below.*" *See 800 MHz Order* ¶ 261 (emphasis added). The Commission then proceeded to discuss the various limitations upon Sprint's right to seek reimbursement from MSS entrants, including the limitation on Sprint's right to seek reimbursement only from "MSS entrants that enter the band prior to the end of that [36-month rebanding] period." *Id.*

[41] *Id.*

the unique circumstances in [Sprint] Nextel's receipt of BAS spectrum."[42] These "unique circumstances" included Sprint's firm commitment to relocate all BAS incumbents from the 1990-2025 MHz band within a limited period of time in exchange for extraordinary concessions granted to Sprint, including premium nationwide spectrum valued at $4.86 billion and the right to receive full credit for any unreimbursed BAS relocation costs to offset any "anti-windfall" payment that may be owed to the U.S. Treasury.[43] Given these extraordinary concessions, there is nothing unfair about the Commission's decision to set a termination date for the MSS reimbursement obligation and to preclude Sprint from seeking reimbursement after that date.

Consequently, any reimbursement obligation for MSS entrants that had not entered the band by June 26, 2008 terminated on that date, and any regulatory modification seeking to impose a new MSS reimbursement obligation long after that date has passed is impermissibly retroactive. The rights of the parties can and must be determined under the *existing* regulations.

IV. NO REASONED BASIS EXISTS FOR CHANGING COST-SHARING REQUIREMENTS

A. Changes to Cost-Sharing Requirements Undermine the Commission's Careful Balancing of Interests, Shifting the Burdens of Delay to MSS Operators

Even if the Commission could conduct this rulemaking despite DBSD's bankruptcy, and could impose retroactive rules (which it cannot), the reasoning behind the Commission's proposed new regulation is incorrect, arbitrary, and capricious. The Commission postulates that the balance of interests among parties to the BAS relocation procedures requires adoption of new

[42] *See Improving Public Safety Communications in the 800 MHz Band,* Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 113 (2005) ("*800 MHz MO&O*").

[43] *See id.* ¶¶ 212, 251, and 297.

cost-sharing requirements.[44] But the proposed new requirements in fact would upset that balance by allotting to MSS operators the burden of risks explicitly identified by the Commission and accepted by Sprint in the *800 MHz Order*.[45] The Commission specifically warned at the time that Sprint was "taking the very substantial risk that it could end up incurring costs that are greater than the value of the spectrum rights it receives."[46] It also made clear that delay in BAS relocation could subject Sprint to forfeitures or to revocation of its 1.9 GHz licenses.

Although delays in the true-up process seem likely to permit an accounting that will allow Sprint to avoid an anti-windfall payment, ongoing delays in the BAS transition itself deprive MSS operators and consumers of the public interest benefits of the timely, predictable access to spectrum required as part of balancing of interests contemplated in the *800 MHz Order*. Due to delays in both the 800 MHz rebanding and BAS relocation, true-up is now set to take place no earlier than December 31, 2009, almost certainly before either transition is completed. These delays require that DBSD carry costs that were not required or anticipated at the time of the *800 MHz Order*—that order anticipated the completion of BAS clearing in roughly the same time frame as MSS milestone completion and commencement of nationwide operations.[47]

In contrast to MSS entrants and consumers, Sprint and the BAS licensees have suffered no harm from the BAS relocation delays. Despite extensive delays, the BAS relocation process has provided for an orderly BAS transition and afforded Sprint enormous benefits. BAS

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[44] *See Order and FNPRM* ¶¶ 63, 81.

[45] *See 800 MHz Order* ¶¶ 181-187 (requiring that Sprint provide additional financial assurances and noting possible penalties, including forfeiture of Sprint's 1.9 GHz licenses, should relocation cost projections prove inadequate).

[46] *Id.* ¶ 214 (noting that "we have… imposed significant obligations beyond what the parties proposed to ensure that the public receives full benefit in exchange for making other spectrum available to [Sprint].").

[47] *Id.* ¶ 270.

operators continue to enjoy the use of spectrum while they are being relocated. BAS incumbents in uncleared markets have reported no interference from limited MSS and ATC test operations since launch of DBSD's satellite, satisfying the Commission's concern for minimizing disruption to BAS operations.

Benefits realized by Sprint include the clearing of 103 BAS markets, making available to Sprint 10 MHz of fully licensed spectrum covering 138 million people. Clearing costs for which Sprint can claim credit against its anti-windfall payment include the costs of relocating secondary BAS licensees—costs that Sprint voluntarily assumed and was never required to bear.[48] Sprint's commercial use of the 1.9 GHz spectrum immediately upon BAS clearing in each market was intended to help fund its transition efforts,[49] but there is no indication to date that the spectrum is being commercially used at all.

DBSD's circumstances stand in sharp contrast to Sprint and the BAS licensees. The expected BAS relocation delay of at least two and a half years (and possibly longer) has imposed tremendous, unanticipated burdens on MSS operators. When the Commission adopted the Sprint-BAS relocation plan in July 2004, it expected that BAS clearing would be completed within two and a half years, as Sprint had promised, thus allowing MSS operators to meet their final milestones and begin operations shortly afterward. In fact, nearly four years after Commission adoption of the Sprint-BAS relocation plan, less than 15 percent of the top 30

[48] *See 800 MHz MO&O* ¶ 107.

[49] *800 MHz Order* ¶ 222 ("We recognize that Nextel may need to apply revenues derived from 1.9 GHz service to meet its obligation to timely complete 800 MHz band reconfiguration. It can do so only if it is afforded timely and certain access to 1.9 GHz spectrum rights in exchange for vacating certain 800 MHz spectrum and assuming the cost of 800 MHz band reconfiguration. Reconfiguration of the 800 MHz band is essential to our goal of timely abating unacceptable interference to public safety, CII and other 800 MHz systems. Given the unique facts of this case, there is an inextricable connection between quick abatement of unacceptable 800 MHz interference and Nextel's quick access to additional spectrum").

markets were cleared at the time of DBSD's final milestone certification in May 2008, and DBSD was barred from commencing commercial service despite being the first 2 GHz MSS operator to launch its satellite and comply with all milestone requirements.[50] Since DBSD launched its satellite in April 2008, it has assumed substantial costs for maintenance of its satellite in orbit without any certainty about the timing of its access to 2 GHz spectrum. DBSD has been forced to conduct tests and trials of its MSS system in a very limited geographic area.[51] This extremely circumscribed access to spectrum has deprived DBSD of the opportunity to earn revenues prior to incurring any reimbursement obligation, as it would have had under the scheme adopted in the *800 MHz Order*. Consumers and the general public also have been deprived of the unique benefits that only the next-generation of MSS systems can offer.

DBSD and consumers suffered serious harms as a result of BAS relocation delays and limitations on MSS entry into service. DBSD's lack of access to the band, and resulting inability to advance its business more rapidly, has limited its ability to access the capital needed to fund its business in the timeframes originally projected. MSS entrants and consumers have not enjoyed the benefits of predictability or certainty that rapid clearing would have provided, which has placed DBSD in particular in an untenable position.

B. The Commission Should Retain the June 26, 2008, Date for Purposes of Any MSS Reimbursement Obligation

The proposed regulatory modification, if adopted, would compound the burdens that MSS operators already bear. Under the Commission's decision in the *Order and FNPRM*, MSS operators are allowed to begin commercial MSS operations, but must do so without nationwide

[50] In the *800 MHz Order*, the Commission imposed an additional burden upon MSS operators by eliminating the prior requirement that BAS operators outside of the top 30 markets must cease operations on BAS channels 1 and 2 once MSS operations have commenced in accordance with the top 30 market rule. *See 800 MHz Order* ¶ 269.

[51] DBSD has been conducting trials in Las Vegas, Nevada, and Raleigh-Durham, North Carolina.

access to spectrum, which the Commission has long acknowledged is essential for MSS systems.[52] Although secondary MSS operations is permitted in any remaining uncleared markets, prior coordination with both BAS fixed receive sites and BAS mobile units is required before MSS operations can begin. This coordination activity would add significant delay and uncertainty to the commencement of MSS operations.

Under the circumstances, imposition of additional or unanticipated reimbursement obligations on DBSD disavows the stated principles articulated in the *800 MHz Order* and in the *Emerging Technologies* cost-sharing policies, requiring the balancing of burdens and interests. BAS licensees and Sprint will have completed the BAS transition essentially as originally envisioned—BAS with minimal disruption to its operation, and Sprint with valuable spectrum and the opportunity to avoid an anti-windfall payment to Treasury—while DBSD and consumers will have suffered serious harms as a result of the relocation delays, uncertainty, and limitations on MSS entry. Applying the cost-sharing principles as proposed in the FNPRM will unfairly benefit Sprint, ensuring that it both avoids an anti-windfall payment (using credits for relocating primary and secondary BAS licensees) and recoups any remaining relocation costs through reimbursement from both MSS and AWS entrants. Although the *800 MHz Order* was based on Sprint's commitment to accomplish the BAS relocation swiftly and acceptance of the risk of transition delays and higher than anticipated transition costs, the Commission's proposed

[52] *See, e.g., In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, ¶ 27 (2000) ("*MSS Second R&O*"); *see also March 2008 Order* ¶ 34 ("Because of the delay in the relocation of BAS, a new and significant element of this proceeding is the balancing of our interest in finding a means of permitting MSS operators to begin to deploy nationwide service as soon as January 1, 2009 with a realization that some unrelocated BAS operators may still be operating in the band after that date.").

modification would absolve Sprint of these risks and remove any incentives for Sprint to move quickly or to limit relocation costs.

The *800 MHz M&O* modified MSS rights and obligations based on Sprint's representations.[53] Adoption of the approach proposed in the joint Sprint/ BAS relocation plan resulted in a clearing process that rendered MSS clearing efforts duplicative, enormously inefficient, and counterproductive.[54] MSS operators were supposed to benefit from Sprint's rapid clearing and payment of upfront costs, such that any additional MSS burdens were expected to be limited in scope and duration.[55] Under current circumstances, MSS operators and consumers have not enjoyed the benefits of predictability or certainty that rapid clearing would have provided, and have suffered serious harms under this scheme. The ongoing BAS relocation delays have operated to prohibit MSS access to 2 GHz spectrum for nearly two years and will continue to impose severe restrictions, with particularly serious impact on DBSD's post-launch business development.

Sprint willingly and knowingly assumed the risks of unanticipated costs or delay under the Commission-imposed BAS relocation framework. The public interest and consumers are ill-served by re-writing the rules of the road after all these years and in the process imposing greater unanticipated burdens on MSS operators. Consistent with its previous findings and equitable

[53] The rules adopted in the *800 MHz MO&O* allowed BAS licensees to continue operations on BAS Channels 1 and 2 in markets 31-100 even after the top 30 markets and fixed BAS links have been cleared, so that instead of being able to operate nationwide at this benchmark, MSS operators would have had to coordinate with BAS operations until clearing was complete. The BAS relocation plan proposed by Sprint and endorsed by BAS licensees would have ensured that such a period of overlapping obligations, if any, would be very brief.

[54] *See March 2008 Order* ¶ 30.

[55] *See 800 MHz Order* ¶¶ 269-270.

balancing of interests in this proceeding, the Commission should retain the June 26, 2008 date for purposes of determining MSS reimbursement obligations.

V. ANY REGULATORY MODIFICATION MUST ACCOUNT FOR THE SIGNIFICANT IMPACT OF CHANGED CIRCUMSTANCES ON MSS

Should the Commission nevertheless decide to modify its cost-sharing requirements for BAS relocation, any modification must account for additional burdens that current circumstances have placed on MSS. The delay in DBSD's access to uplink spectrum has imposed unanticipated costs, contrary to the balancing of interests in the *800 MHz Order*. Upon Sprint's March 2007 announcement of an expected BAS relocation delay of more than two years, DBSD had to revise its plans for initial testing and operation of its satellite to accommodate the likelihood that at best a very limited geographic area of the country would be cleared of BAS by the time of its satellite launch.[56] To date, DBSD has maintained its satellite in orbit for 15 months of the expected 15 years of useful life of the satellite, at costs approaching $500 million to construct and launch and many more millions per year to maintain. At the same time, DBSD has had no opportunity to earn service revenues, contrary to the Commission's expectations when Sprint committed to complete BAS relocation by 2007. A significant portion of DBSD's satellite life has passed without the opportunity to derive revenues from commercial operation, which for MSS requires provision of nationwide service.[57] These factors, and the continuing

[56] Indeed, as of March 5, 2007, Sprint cleared only the Yuma, Arizona and Lima, Ohio markets. *See* Sprint BAS Relocation Status Report, WT Docket 02-55, ET 01-185, 00-258, at 24 (filed March 5, 2007).

[57] *See In the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, Second Report and Order, 2 FCC Rcd 485, ¶ 41 (1987) (noting that "MSS is a nationwide service when provided to mobile earth stations, for example, those located on moving vehicles").

impact of lack of a nationwide MSS footprint until BAS relocation is completed, must be considered before the current reimbursement scheme is revised.

A. The Commission Should Adopt Measures to Mitigate Additional MSS Burdens.

If the Commission insists upon retroactively modifying the cost-sharing requirements, it should adopt the following measures to mitigate any additional MSS burdens. *First*, MSS entrants should be allowed to delay payment until at least the end of the true-up process. In fact, any payment should be allowed to be made after the true-up process and under an installment payment plan.[58] MSS operations will begin amid considerable uncertainty about access to spectrum prior to completion of BAS relocation, and the Commission properly raised the timing and degree of spectrum access as factors to be considered in any revised reimbursement scheme.[59] The coordination requirements will require that MSS operators seek detailed receive site information from broadcasters, conduct studies of the likelihood of interference with identified fixed and mobile receive sites, and engage in discussion with broadcasters on how best to ensure that MSS operations do not cause harmful interference to BAS operations. This activity will extend the period in which MSS is prohibited from engaging in revenue-generating commercial operations. Requiring a significant lump-sum payment under the current circumstances as proposed in the *FNPRM* would create an additional and unwarranted hurdle to MSS operators seeking introduction of commercial service.

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[58] The Commission specifically asks about delaying payment until the BAS re-banding is complete, but invites comment on other dates. *Order and FNPRM* ¶ 98. At a minimum, it would be unreasonable to require a nationwide satellite company that has been denied the opportunity to provide service for over a year, to pay any portion of costs prior to completion of re-banding. MSS does not "benefit" from BAS clearing until nationwide service, without restriction, is possible.

[59] The Commission was mindful that "MSS licensees [should be able to] spread out the cost of BAS relocation over several years, and pay much of the cost out of operating revenues, rather than start-up capital." *See MSS Second R&O* ¶ 35.

Second, any amounts deemed owed by DBSD should include an offset for the extended period in which BAS relocation delays have barred DBSD from commercial operations. Under Sprint BAS relocation schedule as adopted in the *800 MHz R&O,* BAS relocation was required to be completed by September 2007, long before DBSD was required to launch and operate its satellite. The BAS relocation delays, however, have prevented DBSD's access to 2 GHz spectrum for at least 15 months of the expected 15 years of MSS satellite life. As noted above, the Commission's requirements for coordination with BAS operations will involve activities that will further delay any DBSD commercial operations. Accordingly, any amounts deemed owed by DBSD under a revised reimbursement scheme should be offset to account for the time (and the associated satellite maintenance costs) that DBSD has been prohibited from engaging in commercial operations.

Third, any cost-sharing modification must apply *Emerging Technologies* principles to accounts for the adverse effects of MSS reliance upon Sprint's timely completion of its relocation obligations. First entrants have a competitive advantage over subsequent entrants, and *Emerging Technologies* cost sharing rules reflect that advantage. Sprint was awarded immediate access to the 1.9 GHz spectrum, and the Commission did so to permit Sprint to rapidly deploy service in the 1.9 GHz spectrum to fund its 800 MHz rebanding.[60] Under the process set in motion in the *800 MHz Order*, Sprint has been in control of the pace and direction of BAS clearing and has had a significant advantage in controlling access to the 1.9 GHz band. Sprint agreed to unique obligations in connection with its unique and unprecedented spectrum deal.

[60] The Commission expressly ordered Sprint to clear the entire 1990-2025 MHz band as a condition of its 1.9 GHz spectrum rights "because it promotes responsible use by Nextel of the 1.9 GHz spectrum we are granting as part of our solution to the public safety interference problem, and because it provides a rapid and efficient band-clearing solution at 1.9 GHz that benefits all parties—Nextel, BAS, MSS, other prospective users of the band above 1995 MHz, and the public." *See 800 MHz Order* ¶ 304.

The Commission's proposal thus conflicts with the Commission's own guidance to Sprint that it must assume the risk of lower spectrum valuation and higher-than-estimated transition costs.[61]

Therefore, at a minimum, MSS and AWS should be entitled the following *Emerging Technologies* protections.

(1) Depreciation should be allowed on the costs Sprint claims are due. Depreciation is typically calculated from the time the reimbursement right is incurred.[62] In microwave cost sharing, the signing of a relocation agreement is the trigger for depreciation. It would be appropriate to commence depreciation from the signing of BAS Frequency Relocation Agreements ("FRA"). As simplicity in administration is important to the Commission's proposed cost sharing scheme,[63] the signing of the first FRA agreement for the band should trigger depreciation for all subsequent costs. This timing would be consistent with *Emerging Technologies* principles, and would allow Sprint sufficient certainty of its relocation costs to choose whether to take credit for relocation costs or to seek reimbursement.

(2) Relocation costs for the top 30 markets and fixed BAS links should be capped. The Commission has traditionally employed a cost cap "to ensure that, if the relocating party provides an incumbent with an extravagant and possibly unwise relocation premium, only

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[61] *See 800 MHz Order* ¶ 214 ("[Sprint] is taking the very substantial risk that it could end up incurring costs that are greater than the value of the spectrum rights it receives. This is because we have … imposed significant obligations beyond what the parties proposed to ensure that the public receives full benefit in exchange for making other spectrum available to [Sprint]").

[62] *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 8825, ¶ 72 (1996) ("*Microwave Cost Sharing Order*"). The reimbursement amount decreases over time to reflect the fact that the initial relocator has received the benefit of being first to market, and to ensure that the initial relocator pays the largest amount, which the Commission established to provide an incentive to the relocator to limit relocation expenses. *Id.* ¶ 74.

[63] *See Order and FNPRM* ¶ 92.

reasonable relocation costs need be paid by subsequent entrants who benefit from the relocation."[64] Estimates and timelines were integral to the spectrum deal struck in the *800 MHz Order*. Now the clearing timeline has at least doubled, and the costs Sprint seeks to recover have apparently nearly doubled. Without a cap on the costs it can incur, Sprint has been effectively unchecked in its ability to inflate the amounts it claims are due.

(3) Sprint's actual costs should be scrutinized during the true-up process and capped appropriately.[65] The Commission placed strict accounting procedures on Sprint's 800 MHz rebanding expenditures to protect public safety and the integrity of the true-up process, but put only an annual unaudited reporting requirement on Sprint for its BAS costs.[66] The Commission should adopt accounting procedures for Sprint's BAS relocation similar to those in place in the 800 MHz rebanding process.

B. The Commission Should Retain Existing Requirements That Serve to Balance MSS Burdens

In addition to the measures proposed in Section V(A) above, the Commission should retain existing BAS relocation and reimbursement requirements that serve to limit MSS burdens. First, MSS operators should not be required to relocate BAS incumbents in any market after the

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[64] *See MSS Second R&O* ¶ 100. The Commission has also capped other various costs to prevent abuse by the first entrant. *See, e.g.*, *Microwave Cost Sharing Order* ¶ 43 (cap on transaction costs).

[65] In connection with scrutinizing Sprint Nextel's costs, the Commission should reaffirm that MSS operators have no reimbursement obligation for the costs of relocating secondary BAS incumbents licensed after June 27, 2000. The Commission previously allowed Sprint to voluntarily relocate secondary BAS incumbents licensed after June 27, 2000, but expressly noted that MSS operators would not be required to reimburse Sprint for those costs. *See 800 MHz MO&O* ¶ 107.

[66] *See Order and FNPRM* ¶ 99. Moreover, the annual external audit provides data on total expenses, rather than by market, and the Transition Administrator is under no obligation to analyze, audit or verify the data that Sprint Nextel supplies on the cost of clearing the 2 GHz spectrum.

current BAS sunset date of December 9, 2013.[67] The Commission's proposal to require MSS operators to relocate BAS incumbents outside of the top 30 markets after the sunset date would create an additional economic burden on MSS and ignores the Commission's objective in assigning sunset dates. The BAS sunset is long-settled and should remain fixed at 2013. BAS licensees have been on notice that they must relocate since 1997,[68] and Sprint began BAS relocation market-by-market kick-offs four years ago, in 2005, pursuant to the joint Sprint/BAS relocation plan. In addition, the DTV transition, cited as a factor in BAS relocation delay, is now effectively complete and broadcaster resources can be more fully directed at reconfiguring the BAS band. Removing the sunset at this late date would also create disincentives to BAS to complete relocation under the Sprint/BAS Plan.[69] Removing the relocation sunset would be the wrong policy – especially given that the Commission is concerned that some BAS licensees are not currently acting with good faith.[70]

Second, the Commission should retain the current requirement limiting any reimbursement to the eligible clearing costs for the top 30 markets and fixed BAS links. Any expansion of the eligible clearing costs would be outrageously unfair given all the circumstances described above. DBSD strongly opposes any modification that would require MSS entrants to

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[67] *See Order and FNPRM* ¶ 107 ("We also propose to specify that once the MSS entrants have incurred an obligation to relocate the BAS incumbents within the three and five year periods, the occurrence of the December 9, 2013 sunset date will not serve to terminate that obligation.")

[68] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, First Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 7388, ¶¶ 10-15 (1997) ("*2 GHz MSS Allocation Order*").

[69] "At the same time, arguments that there needs to be some certainty of an end date for the transition, as well as an incentive to BAS incumbents to negotiate, are well taken." *MSS Second R&O* ¶ 52.

[70] *Order and FNPRM* ¶ 110 ("We are concerned that some BAS licensees may not be making a good faith effort to complete the BAS transition in a timely manner.").

pay a *pro rata* share of all BAS relocation costs, regardless of market size.[71] The maximum reimbursement to which Sprint could be entitled from any MSS entrant entering before the newly proposed sunset date must be limited. Consistent with the existing regulatory framework, the costs must be limited to those that Sprint incurred for clearing the top thirty markets and for relocating all fixed BAS links,[72] all of which originally were required to be cleared by Sprint by September 7, 2007.

Third, no changes should be made to the cost-sharing scheme to allow Sprint to seek recovery attributed to the full 20 megahertz of MSS spectrum from one MSS licensee, thereby leaving the MSS licensee to collect *pro rata* from the remaining MSS licensee.[73] This would also be inequitable under the circumstances. This type of collection process was not envisioned by the original MSS clearing scheme[74] or the Sprint scheme and, if implemented, would seriously compound the burdens imposed on MSS by the current circumstances. Moreover, now that both MSS operators have launched their satellites and both soon will access their respective portions of the 2 GHz band, there is no logical basis for imposing reimbursement obligations for the entire MSS band on only one of the two entrants.

VI. THE COMMISSION SHOULD AUTHORIZE MSS TO OPERATE ON A SECONDARY BASIS IN UNRELOCATED BAS MARKETS

DBSD supports the Commission's proposal to incentivize BAS efforts in complying with the new February 8, 2010 deadline. BAS operations remaining in place after February 8, 2010

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[71] *Id.* ¶ 86.

[72] *Id.*

[73] *Id.* ¶87.

[74] *See MSS Second R&O* ¶ 68 ("To ensure that the costs of relocation are divided among MSS licensees on a *pro rata* basis, MSS licensees will be required to conduct an accounting to 'true up' relocation expenditures. At any point after the end of the BAS transition, any MSS licensee may demand from all other licensees complete records on funds disbursed for relocation, and reimbursement received from other MSS licensee.").

should become secondary to MSS. DBSD also supports the Commission's proposal that BAS operations leave Channels 1 and/or 2 vacant in markets with capacity to do so, and that narrow in place BAS channels in markets that have installed digital equipment.

A. MSS Studies Show that Potential Remaining Interference Risk to BAS Is Negligible

DBSD made its technical case last year for operating on a secondary basis without coordination.[75] DBSD is concerned that its position has been misinterpreted. The elements that the Commission apparently found lacking in the du Treil, Lundin and Rackley ("dLR") report (computer simulations and certain assumptions), submitted by TerreStar, were not even relied upon in the DBSD report. The Commission also erroneously states that "MSS mobile terminals are not yet available."[76] DBSD based its study on the actual characteristics of the DBSD mobile devices being utilized in trials in Las Vegas and Raleigh Durham. Therefore, DBSD properly maintains that based on the probability analysis in the initial report,[77] any interference between roaming DBSD user devices and BAS operations will be extremely improbable and imperceptible if it occurs at all. Coordination is a barrier to nationwide operations that is overly burdensome on MSS compared to the minimal benefit to BAS operations.

B. Extensive Coordination Serves as a Barrier to Entry

DBSD also opposes the Commission's proposal to require MSS operations in cleared markets to coordinate with BAS operations in uncleared markets. Market boundaries are most likely to be drawn in areas in-between densely populated areas. Therefore, the probability of a

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[75] *See* Comments of New ICO Satellite Services, G.P. in WT Docket 02-55, ET Dockets 01-185 and 00-258 (submitted April 30, 2008) at Annex A.

[76] *Order and FNPRM* ¶ 50.

[77] The probability is even lower now that the BAS transition has progressed further, and DBSD nationwide operations have been delayed.

mobile device in a less densely populated area of a cleared market operating within line of site of a BAS receive site on the fringe of an adjacent uncleared market is very low. Requiring MSS to coordinate operations in cleared markets with BAS operations in adjacent uncleared markets, however, adds a level of complexity and delay that far outweighs the remote potential benefits of coordination. DBSD therefore opposes the Commission's proposal to ban operation of MSS devices within line-of-site of BAS receive sites in uncleared markets.

VII. CONCLUSION

DBSD strongly urges the Commission to stay these proceedings in light of DBSD's Chapter 11 filing. In any event, the Commission should not issue new regulations that are unlawfully retroactive and lack a reasoned basis. If the Commission nonetheless persists in issuing new regulations, at a minimum, the regulations should mitigate the unfair, additional burdens being placed upon MSS entrants. Finally, the Commission should allow MSS entrants, which have invested hundreds of millions of dollars to successfully launch their satellites, the ability to operate in uncleared markets on a secondary basis.

Respectfully submitted,

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